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State of California Seeks a Rehearing of Appellate Court Decision on CALFED Bay-Delta Program

State attorneys Monday (Oct. 24) filed a petition with California's Third District Court of Appeal seeking a rehearing of the court's Oct. 7 decision. The court had ruled that there were three deficiencies in the environmental documents prepared for the CALFED Program to comply with the California Environmental Quality Act (CEQA).

"We believe the court was wrong in the deficiencies it identified in the CALFED environmental documents," said Secretary for Resources Mike Chrisman. "Our petition for rehearing points out the legal and factual mistakes made by the court, and we hope they will take a second look at these issues."

The state disagrees with the court's ruling that the CALFED environmental documents failed to analyze three issues adequately.

First, the court stated that the CALFED environmental documents should have considered reducing the current level of exports of water from the Delta. This approach would have reduced the water available for population growth in Southern California. In reality, CEQA did not require the State to analyze this alternative because it would not meet one of the four fundamental objectives of the project--increased water supply reliability.

Second, the court ruled that the CALFED environmental documents did not adequately disclose either the sources of water that would be used for the CALFED program or the impacts of using water from these sources. Again, the court erred in reaching this conclusion. The environmental documents did, in fact, disclose the sources of water for the program and analyzed their impacts at a level of detail appropriate for the 30-year CALFED program.

2.

Third, the court stated that CALFED's environmental documents did not sufficiently analyze the impacts of the innovative Environmental Water Account. The petition for rehearing shows why the environmental documents did provide sufficient information on impacts.

Finally, if the Court of Appeal does not change its ruling, the State asked the Court to send the case back to the trial court for a determination of the measures that would be required to remedy any defects in the environmental documents.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

IN RE: BAY-DELTA PROGRAMMATIC
ENVIRONMENTAL IMPACT REPORT
COORDINATED PROCEEDINGS;

DON LAUB, et al.,
Plaintiffs and Appellants,

v.

JOSEPH GRAHAM (GRAY) DAVIS, et al.,
Defendants and Respondents,

REGIONAL COUNCIL OF RURAL COUNTIES,
et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, et al.,
Defendants and Respondents,

DEPARTMENT OF WATER RESOURCES, et al.,
Real Parties in Interest and Respondents,

SAN JOAQUIN RIVER GROUP AUTHORITY, et al.,
Interveners and Respondents.

CONSOLIDATED
CASE NOS.

C044267
[Fresno Superior Court
No. 00CG1167]

C044577
[Sacramento Superior
Court No. 00CS01331]

Appeal from the Superior Court
of the State of California for the County of Sacramento,
Judicial Council Coordination Proceedings No. 4152
The Honorable Patricia C. Esgro, Judge

STATE RESPONDENTS' PETITION FOR REHEARING

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STATE RESPONDENTS' PETITION FOR REHEARING

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INTRODUCTION

State Respondents respectfully petition this Court to vacate its opinion in these proceedings filed on October 7, 2005 ("Opinion") pursuant to the California Rules of Court, Rule 25. Rehearing should be granted at the outset because the Opinion wrongfully concludes that a reduced export alternative must be studied, even though it would fail to achieve the water supply reliability objective of the CALFED Program.

This holding disregards the conclusion of eighteen state and federal agencies that in crafting a viable solution to fix the Bay-Delta, the four CALFED objectives of water quality, ecosystem quality, water supply reliability, and levee system integrity were co-equal and interconnected. Prior efforts to proceed with narrower solutions had failed. The agencies reasonably concluded that they had to carefully balance achieving each of the four objectives, and that none of them could be disregarded or even discounted in developing a plan that would have any hope of success. The Opinion is thus flawed in second-guessing the conclusion of the agencies that an alternative that would reduce water exports from the Delta would not meet the CALFED Program's fundamental purpose.

The Opinion also omits evidence showing that the approaches to reducing exports that the agencies did consider were reasonably rejected as infeasible. To the extent that the Opinion suggests a reduced export alternative that the agencies have not considered, it is the role of the lead agency, not the Court, to make an initial assessment of feasibility prior to determining whether such an approach must be studied in the PEIS/R.

The Opinion faults the PEIS/R for its treatment of sources of water for the CALFED Program (Slip. Op., p.122), but omits many of the sources discussed in the PEIS/R, such as conjunctive use of groundwater and

surface water, new groundwater storage, and flexible operation of existing reservoirs and of export facilities in the Delta. The Opinion does not acknowledge that water for the CALFED Program, and in particular for environmental needs, will come from a combination of sources, and that the exact combination may change over time. "Forced appropriation," incorrectly mentioned as a possible source in the Opinion (Slip Op., p.121), would be contrary to the CALFED Water Transfer Program principle that all transfers must be voluntary.

The Opinion suggests that new storage may be necessary but that the "PEIS/R attempts to forestall the inevitable battle over storage by leaving the source of Program water undefined". (Slip Op., p.121.) No party argued that the CALFED Program had to identify at the programmatic stage which storage projects would ultimately be constructed. Because the exact storage projects that would prove feasible cannot be known at this early programmatic level, the Program included a range of storage in the Preferred Project Alternative, from zero to 6 million acre-feet. Using representative storage projects and locations, the PEIS/R analyzed the impacts of the Project both with no new storage, and with the full amount, including impacts from inundation of land and impacts on streamflow, Delta outflow and other hydrologic conditions.

The Opinion acknowledges that "the dynamics of the Program will not allow ... identification [of the ultimate source of water for the Program] at this early stage with any precision" (Slip Op. p.122), but faults the PEIS/R for not analyzing the impacts of supplying water from the sources with more specificity. In fact, the PEIS/R contains extensive discussion of the impacts of supplying water from particular types of sources. The impacts are not listed on a single table, by water source, but they are included in the analysis of the impacts of the project as a whole, by resource area, by region.

These same types of water sources were identified for the Environmental Water Account (EWA) in the Draft PEIS/R and carried over into the Final PEIS/R. In its first years, the EWA would depend upon voluntary purchases of water and flexible operations of existing facilities. The environmental impacts of those water management tools were analyzed in the PEIS/R and thus the additional detail disclosed in the Framework for Action and included in the Phase II Report in the Final PEIS/R and would not have changed the PEIS/R's analysis.

Finally, the Court should clarify that the Opinion is not intended to require specific corrective action on remand, but that the trial court has discretion to tailor an appropriate remedy under Public Resources Code

section 21168.9 in light of the time that has passed, and the intervening events that have occurred, since the PEIS/R was first certified.

ARGUMENT

I.

IT IS AN ERROR TO HOLD THAT THE PEIS/R MUST EVALUATE AN ALTERNATIVE THAT FAILS TO MEET A FUNDAMENTAL OBJECTIVE OF THE CALFED PROGRAM.

The Court's decision holds that the Resources Agency should have studied a reduced export alternative because it would achieve "most" of the CALFED Program's objectives. (Slip Op., p. 155.) There are two flaws in this holding. First, it is a mistake of law to interpret the word "most" in Guidelines section 15126.6 to require a lead agency to analyze a project alternative that fails to meet a fundamental and necessary project objective. Further, the decision ignores the substantial evidence demonstrating that all four basic objectives were necessary for the CALFED Program to be successful.

A. Guidelines Section 15126.6 Does Not Require A Lead Agency To Evaluate An Alternative That Fails To Meet A Fundamental Project Purpose.

The range of alternatives in an EIR is governed by a rule of reason.

(Guidelines, § 15126.6, subd. (f).)^{1/} “Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose.” (*Citizens of Goleta Valley v. County of Santa Barbara* (1990) 52 Cal.3d 553, 566 [“*Goleta II*”].) The lead agency, in assessing which alternatives to evaluate in an environmental impact report (EIR), is guided by notions of feasibility, meeting project objectives, and lessening any of a project’s significant environmental impacts. (CEQA Guidelines, § 15126.6, subd. (c); Pub. Resources Code, §§ 21061.1, 21002.)

The Opinion interprets CEQA Guidelines section 15126.6 to require a lead agency to evaluate an alternative that fails to meet a fundamental project objective, so long as it meets “most” of the objectives. (Slip Op., pp. 155-156.) According to this view, a reduced export alternative would achieve “most” of the CALFED Program’s objectives because it allegedly would accomplish the water quality and ecosystem objectives, even though it would fail to meet the water supply reliability objective, and without regard to the levee system integrity objective (Slip Op., p. 159.) In essence, the Opinion holds that since meeting “most” objectives does not mean meeting “all” of them, a lead agency must study an alternative that it

1. The CEQA Guidelines are found at Title 14, California Code of Regulations, section 15000 et seq. (“Guidelines”).

has determined fails to meet a fundamental and necessary project objective.

(Slip Op., p. 155, 159.)

This interpretation of Guidelines section 15126.6 is inconsistent with CEQA cases that hold an EIR need not analyze in detail an alternative that would fail to accomplish the fundamental purposes of the project. (*Goleta II, supra*, 52 Cal.3d at pp. 561, 570-575 [no requirement for EIR to analyze inland location alternatives to an ocean-front hotel because inland locations would not meet basic objective of oceanfront resort]; *Save San Francisco Bay v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908, 922 [no requirement for EIR to analyze non-Bay location alternatives to a Bay-oriented aquarium].) Cases under the National Environmental Policy Act (NEPA) are in accord. (*City of Angoon v. Hodel* (9th Cir. 1986) 803 F.2d 1016, 1021 ["Where the [agency's] purpose is to accomplish one thing, it makes no sense to consider alternative ways by which another thing may be achieved."]; *Westlands Water Dist. v. US Dept. of Interior* (9th Cir. 2004) 376 F.3d 853, 871 ["it would turn NEPA on its head to interpret the statute to require . . . an in-depth analysis of . . . alternatives that are inconsistent with an agency's objectives."] It is for the lead agency to determine that a project objective, even if one among several, is so fundamental as to be necessary

for the project to be viable. (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1398-1401.)

Even the two cases cited in the Opinion, *City of Carmel-by-the-Sea v. U.S. Department of Trans.* (9th Cir. 1997) 123 F.3d 1142, and *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, are unavailing. Both cases upheld a lead agency's determination that the alternatives studied in the EIRs at issue adequately met the project objectives. Neither case holds that where a lead agency determines an alternative fails to meet a fundamental objective, that it must nevertheless be studied in the EIR.

Applying a correct reading of these cases and Guidelines section 15126.6 in light of the facts leads to the conclusion that the CALFED PEIS/R was not required to analyze a reduced exports alternative. Reducing exports in light of existing water demands on the Bay-Delta system would not allow the CALFED Program to achieve its water supply reliability objective, and the Court appears to have accepted this reasoning and evidence. (Slip Op., pp. 152-155; see also C-022752, -891; B-000455, -471 to 472; C-027485, -529, -615.) The Opinion therefore incorrectly holds that the Resources Agency must consider an alternative that fails to meet this fundamental objective.

B. The CALFED Program Must Achieve All Four Primary Objectives To Succeed.

Substantial evidence in the record supports the agencies determination that the CALFED Program must achieve all four objectives in order to succeed. The CALFED agencies determined that the Bay-Delta's problems related to the ecosystem, water quality, levee strength, and water supply are inextricably linked physically, ecologically, and socio-economically. (C-022752, -779 to 780; C-023926, -939, -942 to 944, -4035 to 4036; A-000120, -128; D-000021, -24, -34.) Prior efforts focused on fixing just one or two of these problems have not worked, because solving a problem in one area has often created a problem in another. (C-022752, -780; C-027953, -8162.) The CALFED Program is based on a deliberately different approach, which recognizes that, "problems in one resource problem area cannot be solved effectively without addressing problems in all four problem areas at once." (C-022752, -779 to 780; C-027485, -502 to 503, -519 to 520, -616, -622; C-023926, -939, -942 to 944; C-027953, -8163; see also B-000704, -715 [showing linkages between problems and solutions]; B-000855, -942 [same].)

Based on this evidence, the Resources Agency determined that,

“[e]ach of the four primary objectives for the Program [] must be met to achieve the project purpose.” (C-022752, -784; see also A-000120, -247 .)

The Program is therefore designed to address the problems in ecosystem quality, water quality, levee strength, and water supply reliability

“concurrently and comprehensively” to achieve the objectives. (C-022752, -784.) In fact,

The most important single difference between the CALFED Bay-Delta Program and past efforts to solve resource problems is the comprehensive nature of CALFED’s interrelated resource management strategy.” (C-023926, -942 to 944.)

The Resources Agency even made a finding that alternatives recommended by the public that focused on meeting just one of the primary objectives, or that disregarded or de-emphasized one or more objectives, “would not carry out the basic purpose of the Program.” (A-000120, -247.)

Under CEQA, and the rule of reason, the Agency was not required to study the reduced export alternative because achieving this objective concurrently with the other three objectives was a basic project goal.

(CEQA Guidelines, § 15126.6, subd. (f).)

II.
**THE OPINION OMITTS MATERIAL FACTS SHOWING
THAT REDUCING EXPORTS BY AGRICULTURAL
LAND RETIREMENT IS NOT FEASIBLE, AND THE
LEAD AGENCY MUST DECIDE IN THE FIRST INSTANCE
WHETHER REDUCING EXPORTS WITHOUT
AGRICULTURAL LAND RETIREMENT IS FEASIBLE.**

The decision is also based on mistakes of fact and law regarding the feasibility of a reduced exports alternative. It states that, “[t]he feasibility of such a reduced export alternative is clear. . . .” (Slip Op., p. 160.) This language appears to suggest that an alternative that includes water conservation measures, combined with a tactic of limiting or reducing population growth by not supplying State Water Project water to areas south of the Delta is feasible. (*Ibid*, citing Carle, *Drowning the Dream: California’s Water Choices at the Millenium* (Praeger 2000), p. 196.) If the decision is suggesting that a reduced exports alternative relying on agricultural land retirement, which the agencies did consider and reject, is in fact feasible, the Opinion omits material facts. If, however, the decision is suggesting a different type of reduced exports alternative, it is the lead agency’s role, not the Court’s to determine if it is feasible and therefore subject to study in an EIR.

As the California Supreme Court has recognized, whether a potential alternative is feasible, and therefore must be discussed in the EIR,

is a determination for the lead agency to make in the first instance. (CEQA Guidelines, §§ 15126.6, subd. (f), 15364; *Goleta II, supra*, 52 Cal.3d at p. 569 [emphasis in original].)

[A]n EIR must discuss and analyze *feasible* alternatives. The []agency, therefore, must make an initial determination as to which alternatives are feasible and merit in-depth consideration, and which do not.

Goleta II, supra, 52 Cal.3d at p. 569 (emphasis in original).

“A feasible alternative is one which can be `accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (*Id.*, p. 574 citing Pub. Resources Code § 21061.1; Guidelines § 15364.)

Substantial evidence in the record that the Opinion disregards demonstrates that the CALFED agencies extensively considered a reduced exports alternative early in the alternatives formulation process and during CEQA scoping, but properly determined such an alternative did not merit inclusion in the PEIS/R. In 1995 and 1996, demand reduction actions that would reduce Delta exports were a centerpiece for potentially resolving the conflict between water supply availability and beneficial uses. (B-005773, -783, -895 [showing demand reduction approach]; -908 [resolve water supply availability conflict with “reduce critical export area demands” approach].) Reduced demand, leading to reduced exports, formed the basis

of several preliminary alternatives. (See B-001453, -491 [core actions involved reducing exports]; B-005773, -956 [preliminary alternatives 201 and 202 emphasize demand reduction approach both upstream, in Delta, and in export area]; -6032 [preliminary alternative WS-1 involved reduced demand in export areas, in the Delta, and upstream]; B-001083, -084, -89 to 90 [Alternative 1 focused on reducing Delta diversions with aggressive urban and agricultural demand management].) The agencies modeled these approaches to determine the hydrologic effects of delivering less water from the Delta to areas south of the Delta. (D-003542 to 545.)

Alternative A, which was one of the 10 alternatives subject to CEQA scoping, involved extensive demand management as a method to reduce exports from the Delta. (B-005773, -6072 to -6076.) This alternative involved permanently retiring 750,000 to 850,000 acres of agricultural land to reduce the demand for Delta exports, as well as wastewater reclamation and water conservation. (B-005773, -6146, -6147.) The combination of tools to reduce water demand was estimated to result in a substantial water savings, and an overall reduction in withdrawals from the Delta. (B-005773, -6076; see also B-005773, -6142, -6146 to 6147 [showing reduced demand for exports].)

The agencies determined, after extensive public debate, that retiring

vast acres of agricultural land, which was necessary to achieve substantial export reductions, was not equitable and would not reduce the very conflicts the CALFED Program was designed to solve. (See B-005773, -6297; G-000681 to 682; G-001098 to -099; G-005933 to 935; E-016084, -085; C-027485, -829; E-016084 to 093.) The cost of land retirement to achieve reduced water exports was also expected to be extreme. (B-006297; E-016084, -085, -091.) Accordingly, the agencies determined that “[t]hese shortcomings make the alternative less implementable.” (B-006297.) The CALFED agencies therefore had a reasonable basis supported by substantial evidence to eliminate this alternative from consideration in the EIR. In light of this evidence, it is erroneous for the Opinion to declare a reduced exports alternative feasible.

Moreover, even if it is suggested that a reduced exports alternative *without* massive agricultural land retirement might be feasible, it is the lead agency’s role to determine whether exports from the Delta could be feasibly reduced based on water conservation efforts alone. (*Goleta II*, *supra*, 52 Cal.3d at p. 569.) As the Court has recognized, the CALFED Program already includes a very aggressive program of water use conservation for the urban, environmental, and agricultural sectors. (Slip Op., p. 154.) Reducing demand south of the Delta even more than water

conservation will allow may or may not be feasible. In any case, the design of such an alternative, and an initial assessment of its feasibility, is the role of the lead agency in the first instance, not the Court. (*Goleta II, supra*, 52 Cal.3d at p. 569.)

**III.
THE FINDING IN THE DECISION THAT ALL THE
ALTERNATIVES IN THE PEIS/R CALL FOR INCREASED
EXPORTS, OR NO REDUCTION IN EXPORTS, IS IN ERROR.**

The holding in the decision that the PEIS/R must study a reduced exports alternative appears to be based on the misimpression that the CALFED Program involves a commitment not to reduce water exports from the Delta, and that “all of the alternatives proposed in the PEIS/R call for increased exports of water to areas south of the Delta, or at least no reduction in the amount of water exports.” (Slip Op., pp. 159-160.) Thus, the Opinion suggests that a reasonable alternative to increasing exports is to have an alternative that reduces exports. (*Ibid*, p. 161.) These suggestions in the Opinion are material mistakes of fact that, once corrected, eliminate the rationale for the holding on alternatives.

The responses to comments explain that the ability to deliver water depends on yearly variations in hydrology and long-term climate trends. Thus, the CALFED agencies specifically declined to set water supply

delivery standards. (C-027485, -682, -685.) “The CALFED Program cannot guarantee specific amounts to specific agencies.” (*Id.*, -687.) “CALFED seeks to improve overall water supply reliability, not to provide specific quantities of new water.” (*Id.*, -690.) “[T]he overall objective of improving water supply reliability does not include commitments for systemwide water targets or specific water deliveries to any water district or region.” (*Id.*, -711, -713; *see also* E-013508, -519 [Director Snow statement re: purpose of Program is “not to meet State’s water demands no matter what they are in the future.”].)

Further, the PEIS/R alternatives do not “call for” increased exports, or a particular amount of water delivery to any sector. The PEIS/R alternatives were evaluated through water modeling, which incorporated a range of uncertainty, including 1995 water demand (Criterion A) or 2020 water demand (Criterion B). (C-022752, -804 to 825l; -3808 to 3832.) The modeling showed that each alternative may or may not result in the opportunity to increase exports of water from the Delta relative to existing conditions, depending on unknown future conditions. (C-027485, -675 -677.) “The Preferred Program Alternative may result in the export of more or less water than under existing conditions within the ranges shown.” (*Id.*, -677.) The EIR shows that, compared to existing conditions,

each alternative could result in less water available for export under Criterion A. (*See* C-022752, -881 [showing existing exports from Delta]; -909 to 910 [No Action with Criterion A results in reduced exports]; -969 [action alternatives with Criterion A result in reduced exports compared to existing conditions]; -3057 [same].)

Moreover, while the modeling showed that under Criterion B assumptions, more water may be available for export relative to existing conditions, this result does not mean the alternatives result in increased exports. The modeling used export water deliveries as a surrogate for all water supply beneficiaries. (C-022752, -898.) Whether any additional water that the modeling shows as surplus is exported to support south of Delta agricultural or urban use, or used for in-Delta water quality or environmental purposes, is not defined by the CALFED Program. (*Ibid.*) “Reallocation of water supplies falls outside CALFED’s authority, but is within the purview of the SWRCB.” (*Id.*, -696; see also C-027485, -668.) Accordingly, the decision wrongly bases its conclusion that a reduced export alternative is required in the EIR on the mistaken finding that all of the CALFED Program alternatives “call for” increased exports.

**IV.
THE OPINION MISSTATES AND OMITTS MATERIAL
FACTS REGARDING THE PROGRAM'S SOURCES
OF WATER**

The Opinion faults the PEIS/R for failing to adequately identify the sources of water for the CALFED Program. As demonstrated below, however, the PEIS/R did set forth and analyze the sources of water for the Program. When the information that was presented in the PEIS/R is considered, the appropriate conclusion is that sources of water were adequately described in the PEIS/R.

**A. The Opinion Omits Facts Regarding Numerous
Sources of Water Discussed in the PEIS/R and
Mistakenly Asserts that "Forced Appropriation"
is a Source.**

The Opinion concludes that the PEIS "leaves the source of program water undefined." (Slip Op. p. 121.) On the contrary, the Draft PEIS/R contained a multi-page discussion of the sources of water, called "water management tools," in the Water Management Strategy section of the Revised Phase II report, June 1999, which was a technical appendix to the Draft PEIS/R.(C -018530, -586 to 634) Each of the tools is described in detail on pages C-018590 through -593 where the interrelationships and potential strengths or weaknesses of the tools are discussed. Excerpts include:

Water Transfers-the term “water transfers generally means the redirection of water initially acquired pursuant to a water right, a contract, or by groundwater extraction from one user to another *on a voluntary and compensated basis*. . . .

CALFED envisions that voluntary, compensated long-term and short-term water transfers will be the primary source of the water needed under the Ecosystem Restoration Program for restoring critical instream flows and improving Delta outflow during key springtime periods. Also, to function adequately, the proposed Environmental Water Account will require the capability to purchase and transfer water for modifying export pumping, instream flows and Delta flow patterns.

Agricultural Water Conservation. Improved agricultural water conservation can result from management and technical improvements at both the irrigation district and farm level.
. . .

Urban Water Conservation. Urban water conservation also helps meet CALFED’s water utility and water access goals. . .

Managed Wetlands Water Conservation. . . . Managed wetlands water conservation can help meet CALFED’s water utility and water access goals.

Water Recycling. Water recycling can help attain CALFED’s water utility and water access goals. . . .

Storage-Surface and groundwater storage can make major contributions to each of the water supply reliability goals, but is especially helpful in improving overall system flexibility.
. . .

Groundwater and Conjunctive Use -Groundwater storage is usually the least expensive type of storage, the type that can be implemented most rapidly, and the type with the least environmental impacts. . . .

Surface Storage- Surface storage is generally more

flexible that groundwater storage, depending on operating criteria. . . .

Hydropower Reoperation. . . . There is the potential to re-operate some of these hydroelectric facilities to produce water supply or ecosystem benefits. . . .

Conveyance. Improved conveyance can potentially contribute to each of CALFED's water supply reliability goals, but makes its major contribution to system flexibility.

. . .

Operational Strategies- CALFED anticipates that the Water Management Strategy will place an increasing reliance on real-time monitoring to achieve its goals of system flexibility and water utility. For example, the majority of fish entrainment for a particular species at water diversion facilities typically may occur during only a short period of time. If that time can be predicted in advance through a monitoring program, diversions can be curtailed and entrainment dramatically reduced with a relatively low reduction in diversion levels. . . .

(*Id.*, emphasis added.)

A similar discussion of sources of water is contained in the Phase II report that is part of the Final PEIS/R. (C-023926, -3983 to 3990.) These discussions of water sources are not acknowledged or cited in the Opinion.

In addition to omitting many of the potential sources of water discussed in the PEIS/R, the Opinion makes an important misstatement concerning a tool that was *not* presented as a source of water in the PEIS/R. The Opinion states: "the PEIS/R acknowledges that willing sellers and conservation efforts will not likely be enough to supply all the water

needed by the Program and, therefore, ‘forced appropriation’ of water from current users or expanded water storage will be necessary.” (Slip Op., pp. 120-21.) This is a material misstatement. First, the statement does not recognize that the Program relies on a combination of interrelated sources of water, and did not anticipate that transfers and conservation would meet the entire need. Moreover, “forced appropriation” is not a source of water under the plan.

The Water Transfer Program establishes the explicit criteria that water transfers must be voluntary. (Water Transfer Program Plan, C-026600, -639.) As acknowledged in the Opinion, the agencies adopted a mitigation measure: “Water transfers must be voluntary.” (Slip Op., p. 168.) This was a sensitive issue with the agencies and stakeholders, and we respectfully ask the Court to remove the references to “forced appropriation.” (Slip Op., p. 121.)

**B. The Opinion Misstates and Omits
Facts Regarding the Need for Storage
and Contains an Unbriefed Question of Law
Regarding the Need to Make the Storage
Decision at the Time the Programmatic Plan Was
Adopted.**

The Opinion states that forced appropriation or new storage will be necessary to supply water for the Program and then suggests that storage may not be able to be accomplished (“likely to meet with stiff resistance”).

(Slip Op., p. 121) Whether or not new storage ultimately proves to be feasible, the analysis in the PEIS/R is adequate. The Preferred Program Alternative was analyzed both with up to 6 million acre feet of storage (Final PEIS/R, C-022752, -2809 and -2899), and with no new storage at all. (*Id.*, -2896.) The final amount will depend on subsequent studies and decisions. (C-023926, -4022 to 28, -4042.)^{2/}

The Court's suggestion that the agencies improperly deferred a decision on storage ("the PEIS/R attempts to forestall the inevitable battle over water allocation and storage ... by leaving the source of Program water undefined", p. 121) presents an unbriefed issue of law. None of the parties alleged that the CALFED Agencies were required to make a decision on specific storage sites at the programmatic level. So long as the PEIS/R analyzed the results of the Preferred Program Alternative with and

2. The Opinion's quotation from a commentator listing environmental problems with dams on page 121 is misleading, and omits the fact that up to 1 million acre feet of the proposed storage is groundwater storage (C-023926, -4020), which generally is more benign from an environmental and land use perspective. (*Id.*, -4015.) The quotation also refers primarily to new on-stream storage (given its reference to blocking fish passage). The CALFED plan, in order to minimize environmental impacts, states that it would focus on off-stream reservoir sites for new surface storage, but would consider expansion of *existing* on-stream reservoirs. "CALFED will not pursue storage at new on-stream reservoir sites." (C-023926, -4022.)

without storage at a programmatic level (see Section V of this Petition), the Agencies could defer a decision on specific storage until it was ripe. (See CEQA Guideline, § 15385, subd. (b).)

C. The Opinion Omits Facts Presented in the PEIS/R Regarding Flexible Operations of Existing Facilities as a Source of Water.

The decision does not appear to recognize that more flexible operation^{3/} of existing CVP and SWP facilities can also serve to better accomplish CALFED goals, even without additional water.^{4/} The observation in the Opinion that “[l]ogic tells us that increased exports from the Delta require increased imports to the Delta” is not always true. (Slip Op., p. 86.) At times when water is already reaching the Delta in amounts greater than required to meet water quality and outflow standards, increases in exports may be made without increases in inflow, thus making better use

3. “Flexible operation” or “reoperation” of existing facilities refers primarily to changes in the timing or amounts of diversions by existing facilities, principally the SWP and CVP export facilities in the Delta, but also includes changed operation of reservoirs, which could change the timing and amounts of releases.

4. A major source of water for transfers that is omitted in the Opinion is water from changes in the operation of existing reservoirs operated by local agencies. (Water Transfer Plan, C-026600, -609; emphasis added.) A local agency with surplus water in storage may sell it to be used elsewhere, and then refill the reservoir during the rainy months, so long as certain conditions are met. (*Id.*, -654.)

of water that has already reached the Delta^{5/}. Shifts in the time of pumping may yield better results for fish with little reduction in overall exports.

(C-006113, -174 [operational strategies].) These potential water management strategies were captured in the water modeling.

(E.g., C-022752, -23831 [Attachment A, showing use of joint point of diversion in modeling].)

D. The PEIS/R identifies the sources of water for the Ecosystem Restoration Program and the Environmental Water Account.

The Opinion cites the Farm Bureau's allegation that the Program will require "nearly 1 million acre-feet of water for the Ecosystem Restoration Program and Environmental Water account^{6/}." (Slip Op., p. 104.) The PEIS/R identifies the primary source of water for the Ecosystem Restoration Program's in-stream flows as "voluntary compensated long-

5. Some of the measures for flexible operation were authorized in separate regulatory agency proceedings. (C-023926, -4033; SCF XXVI:7785 to 7918; [State Water Resources Control Board Decision 1641 approving joint point of diversion]; C-114922, -949 to 951 [fn22] [1995 Water Quality Control Plan approving flexibility in Delta export/inflow ratio].) To the extent that the identified regulatory flexibility had already been approved, those decisions had undergone environmental analysis separately. (C-11492, -931; SCF XXVI: 7785, -7935 to 7949.)

6. In fact, because the ecosystem water will be phased in over time, with up to 100,000 AF of instream flows by the end of stage 1, C-024130, -145) and because 200,000 AF of the water listed for EWA is an initial one-time deposit of water (C-023926, -4032) the actual annual total will be considerably less in the early years, after the first year.

term and short-term water transfers.” (C-023926, -3986; see also C-027485, -7694.) Conservation and new storage are also identified as sources. (C-027485, -834 [Response IA 7.1.7-24].) Local development of conjunctive use facilities and modified operations of existing reservoirs can also generate water for transfer. (C-026600, -609.) The streams on which the instream flows are required are identified with specificity. (C-022752, -966.) Purchases for these flows will be made in the areas tributary to those streams, in the Sacramento River and San Joaquin River regions.

The Opinion states on page 114 that the PEIS/R “does not provide any basis for the estimates of water that will be made available from willing sellers along the various rivers.” The estimates of the water that needed to be purchased were based on ecosystem needs, as expressed in the Ecosystem Restoration Plan. (C-022752, -966.) It was reasonable for the agencies to conclude that voluntary transferors could be found. The Department of the Interior had, in fact, already purchased approximately 230,000 acre-feet of non-CVP water to meet established in-stream flow purposes. (C-026600, -613.) The Water Transfer Program is designed to facilitate water transfers and the further development of the water transfer market. (Water Transfer Program Plan, C-026600,-606.)

As to the source of water for the Environmental Water Account, the

June 1999 Phase II report, contained in the Draft PEIS/R, states:

As envisioned by CALFED, the EWA would need to make use of many of the water management tools described above. Especially in its first few years of operation, *a substantial portion of the water needed for an EWA will need to be acquired through voluntary purchases* on the water transfer market. CALFED's analysis of the EWA concept also suggests that the EWA 'performance' increases as the EWA's *access to surface and groundwater storage* increases. *Flexibility in project operations* and improvements in conveyance facilities can both help deliver environmental water at the desired place and time and can help 'create' new EWA 'assets.'

(C-018530, -629 to 630, emphasis added.)

Common Response 21 in the Final EIS/R refers to the same sources, and informs the public that:

Especially in its first few years of operation, a substantial portion of the assets needed for the EWA will come from access to existing Project Flexibility, new changes in project flexibility (for example, joint point of diversion and export/inflow ratio flexibility) and through voluntary purchases (estimated at \$50 million annually) on the water transfer market. . . .

Flexibility in project operations and improvements in conveyance facilities can both help deliver environmental water at the desired place and time and can help create new EWA 'assets.' This flexibility is essential for the EWA. ...

(C-027485, -579. See also C-023926, -4033.)

Most of the tools that provide water for the EWA, listed on the Table on page 104 of the July 2000 Phase II Report (C-023926, -4032) are operational in nature. They include SWP pumping of certain

environmental upstream releases once they reach the Delta, EWA use of joint point of diversion, flexibility to pump more than ordinarily allowed by the export/inflow ratio, and use of 500 cfs of SWP pumping. Only 185,000 of the 380,000 total acre feet to be acquired annually come from purchases.

Taken together, the misstatements and omissions concerning the sources of water are material because, in fact, the discussion of water sources is more comprehensive than the Opinion acknowledges. Given the broad nature of the Program, the discussion is sufficient for a first-tier Programmatic EIR.

**V.
THE MODELING AND IMPACT ANALYSIS ANALYZE
THE IMPACTS OF THE MEASURES DESCRIBED IN THE
PLAN AND ANALYZE IMPACTS WITH AND WITHOUT
STORAGE.**

The conclusion in the Opinion that the CALFED Plan did not analyze the impacts of the sources of water (Slip Op. p. 122) omits material facts found in the PEIS/R. The impacts analysis in the PEIS/R is organized by resource topic, and the impacts are given by region. While there is no single table showing impacts from sources of water alone, the information on the impacts of the Preferred Project, including the impacts resulting from the uses of water, is found in the individual chapters dealing with the various resource areas.

Storage. With regard to storage, the PEIS/R analyzed the impacts of up to 6 million acre feet of storage, and no storage at all. As the Final PEIS/R explains:

The total volume of new or expanded surface water and groundwater storage evaluated by CALFED ranges up to 6 MAF. This document discusses the consequences of operating and constructing representative surface and groundwater storage reservoirs and related facilities in the Sacramento River Region, San Joaquin River Region, and Delta Region. Operating assumptions for reservoirs in the Sacramento River and San Joaquin River Regions are discussed in Attachment A. The impacts associated with potential operation of reservoirs in these regions were quantitatively assessed through modeling. In-Delta storage operations are not included in the modeling described in Attachment A due to the limitations of system operation modeling. The impacts associated with operation of in-Delta storage reservoirs were assessed qualitatively for this Programmatic EIS/EIR. . . .

(C-022752, -816.)

The impacts of surface storage come from the inundation of land and from hydrologic changes (such as stream flows in the affected rivers) resulting from operations of new storage projects. With regard to land use changes, surface storage in the Sacramento River and San Joaquin River Regions, groundwater storage in both those regions, off-aqueduct surface water storage, and in-Delta storage were analyzed using “representative” storage sites, based on some of the proposed projects. (C-022752, -2870 to 71.) Table 4-3 shows the preliminary calculations of the number of acres of land that would be affected by the footprint of new storage facilities.

(*Id.*) The impacts of storage projects on land are set forth by region for the resource categories which would be impacted by the changes to the land.^{7/}

Water-related impacts of new storage facilities are included in the modeling done to determine hydrologic impacts.

The DWRSIM model [Project Operations Model] was used to programmatically evaluate the effects of *adding new facilities* and changing existing facilities operating criteria *on Central Valley flows*, existing and *new reservoir storage operations*, *Delta exports and outflow* and required water acquisition quantities.

(C-022752, -3811, emphasis added; see also C-022752, -898.)

As Attachment A to the Final PEIS/R explains further:

DWRSIM is designed to simulate operation of the CVP and SWP systems for the purposes of water supply, flood control, recreation, instream flows, power generation, and Delta water quality and outflow requirements. The model is used to analyze the potential effects of proposed new features, such as additional reservoir storage or Delta export conveyance, as well as any changes to criteria controlling project operations. . . .

(C-022752, -3812.) The modeling assumptions for new storage facilities are found on pages A-14 and A-20 to A-22. (*Id.* -3819, -3825 to 3827.)

7. For example, the PEIS/R considered impacts on agricultural land use (C-022752, -3391 [Delta Region], -3392 [Bay Region], -3393 to 3394 [Sacramento River Region], -3395 to -3396 [San Joaquin River Region], -3396 [Other SWR and CVP Service Areas]); wildlife and vegetation (C-022752, -3355 to 3356 [Delta Region], -3357 [Bay Region], -3361 to -3362 [Sacramento River and San Joaquin River Regions]); and geology and soils (C-022752, -3221 [Delta Region, -3223 [Bay Region], -3325 to 3326 [Sacramento River and San Joaquin River Regions]).

Storage is thus modeled along with other program actions, in order to identify the impacts of the Preferred Program Alternative as a whole. The Preferred Program Alternative was modeled both with no new storage and with 6 million acre feet of storage, (*Id.*, -3815, -3819. The results of the modeling, which show impacts on streamflows, Delta outflows, and water supplies, are reported in Chapter 5.1 (C022752, -2875 to 2975 [Water Supply]) and 5.2 (*Id.*, -2976 to 3059 [Bay-Delta Hydrodynamics and Riverine Hydraulics]). This modeling is then fed into another model to analyze water quality impacts (*Id.*, -812), and the results are reported in Chapter 5.3. (*Id.*, -3060 to 3150.)

In Chapter 3, where the environmental impacts are summarized, the impacts of storage and conveyance are listed in Table 3.1, with the impacts of the Preferred Program found in the last column. (C-022752, -838 to 850.) The agencies were not required to choose particular storage projects at the time of adoption of the CALFED plan, but the PEIS/R adequately informed the decision makers of the likely impacts of new storage, and of the impacts of the preferred program if no new storage were included.

Transfers. The impacts of voluntary transfers depend on the type of transfer. The water-related impacts of transfers, such as changes in stream flows, are captured in the water modeling. (E.g., C-022752, -825

[ecosystem flow targets as modeling assumptions].) Where the transfer depends on fallowing of land, the impacts are described in the Chapter on Agricultural Land and Water Use. (*Id.*, -3390, -3392 to 93, -3395, to 96.) The potential for economic changes due to transfers based on fallowing are also discussed for the Sacramento and San Joaquin Regions. (*Id.*, -3420 to 21, -3424.)

The impacts of transfers are described for each resource topic by region, e.g. C-022752, -2913, -2914, -2916 , 2917[water supplies]; -3002 to -3004 [hydrodynamics and riverine hydraulics]; -3089 to 3090 [water quality]; -3184 to 3185, -3189 to 3190 [groundwater]; -3269 [air quality]; -3308 to 3309, -3312, -3316 [fisheries]; -3354, -3357, -3359 [vegetation and wildlife]. Where a transfer depends on direct transfer of groundwater or groundwater substitution, the impacts and mitigation strategies are found in Chapter 5.4. (C-022752, -3184 to -3185.)

The impacts of the Water Use Efficiency Program are also described qualitatively, by resource area, by region.^{8/}

8. Agricultural Land and Water [C-022752, -3390 , -3392, -3393, -3395]; Water Supplies [C-022752, -2912, -2914, -2915, -2917]; Hydrodynamics and Riverine Hydraulics [C-022752, -3002, -3003, -3004]; Water Quality [C-022752, -3089 to 3090]; Groundwater [C-022752, -3181, -3183, -3184, -3189]; Geology and Soils [C-022752, -3320 to 3322, -3324]; Fisheries [C-022752, -3308 to 3009, -3312, -3315 to 3316]; Wildlife and Vegetation [C-022752, -3353 to 3354, -3357, -3359].)

Reoperation of existing facilities. Operational tools, such as joint point of diversion, primarily affect Delta outflow and water supply. The impacts of operating existing facilities more flexibly were analyzed in the water modeling described in Attachment A to the Final PEIS/R.

(C-022752, -812, -819 to 820, -831.) The impacts of the Preferred Project Alternative in Chapters 5.1 and 5.2 include the effects of such reoperation.

In short, the PEIS/R properly analyzed the impacts of the sources of water at the level of detail commensurate with the broad and general nature of the CALFED Plan. Given the uncertainty regarding exact sources, it analyzed the likely impacts of each type of source. The Opinion states:

“The PEIS/R may not be able to provide a precise determination of the sources for Program water. However . . . the PEIS/R must include an analysis *of the impacts of supplying such water*, from whatever source.”

(Slip Op., p. 122; emphasis added.) The PEIS/R did just that.

VI.

THE ENVIRONMENTAL IMPACTS OF THE WATER MANAGEMENT TOOLS THAT COMPOSE THE ENVIRONMENTAL WATER ACCOUNT WERE ANALYZED AT A PROGRAMMATIC LEVEL IN THE PEIS/R

As discussed at Section IV. D., *supra*, of this petition, the sources of water for Environmental Water Account “assets” were described in the

Draft PEIS/R (primarily purchases of water from willing sellers and operational flexibility), and were the very water management tools that were utilized in the Environmental Water Account described in the Framework for Agreement and the Phase II Report in the Final PEIS/R. Those water management tools were included in the Preferred Program Alternative and their impacts were analyzed in the PEIS/R. See Section V of this petition. Because these water management strategies had already been identified and analyzed within certain ranges (see Attachment A to the EIS/R, (C-022752, -2894 to 2895; -3808 to 3831), more detailed information regarding the specific amounts anticipated to be used by the EWA would not have changed the analysis in the PEIS/R.

VII.

THE OPINION SHOULD CLARIFY THAT THE TRIAL COURT RETAINS DISCRETION TO TAILOR A REMEDY UNDER PUBLIC RESOURCES CODE SECTION 21168.9

Only the contents of the PEIS/R were at issue in this appeal. Portions of the Opinion, however, could be interpreted as requiring specific corrective action upon remand. For instance, some of the language in the Opinion suggests that a new EIR should be prepared and circulated for public comment to address aspects of the CALFED program that existed in

August, 2000. (Slip. Op., at pp. 122, 162-63, 197, 207.) On remand, however, the trial court will be tasked with determining the proper remedy under CEQA. (Pub. Resources Code, § 21168.9, subd.. (a) [“If a court finds, as a result of . . . remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with [CEQA], the court shall enter an order that includes one or more of the following”]) State Respondents request that the Opinion be modified to simply instruct the trial court to tailor a remedy in compliance with Public Resources Code Section 21168.9. This would permit the trial court to consider changed circumstances, including the statutory and agency implementation of the CALFED plan, that have taken place in the intervening five years.

CEQA is designed to give the trial court flexibility to tailor a remedy to the circumstances of the case. First, the statute allows the trial court several options—(1) void the agency’s decision, in whole or in part; (2) suspend certain activities pending compliance with CEQA, or (3) take specific action to comply with CEQA. (Pub. Resources Code, § 21168.9, subd. (a).) Moreover, the remedy must include “only those mandates which are necessary to achieve compliance with this division,” and it must be limited to specific project activities if other parts of the project are

severable. (*Id.*, subd.. (b).)

In addition, the lead agency retains some discretion to determine how to comply with any writ. Section 21168.9, subdivision (c), bars court's from "direct[ing] any public agency to exercise its discretion in a particular way." Indeed, this is a basic principle of mandamus law. (See *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62.) Consequently, courts have recognized that, in response to a writ for a CEQA violation, lead agencies may have options on how to fix the problem. The conclusion that an environmental impact report is inadequate does not mean that a public agency will necessarily be required to start the entire process anew. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App. 1099, 1112.) Rather, the agency need only correct the deficiencies in the report identified by a court before considering recertification of that document. (*Ibid.*) The form of that correction is a matter for the agency to determine in the first instance. (*Ibid.*, citing and quoting Pub. Resources Code, § 21168.9, subd. (c).) Likewise, whether the correction requires recirculation of the environmental impact report, in whole or in part, is for the agency to decide in the first instance in light of the legal standards governing recirculation of an environmental impact report prior to certification. (*Ibid.*)

Finally, when it fashions a remedy, the trial court must consider relevant events that occurred after the petition was filed. (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 670.) A writ is an extraordinary remedy—it will not be used to compel a useless act (*id.* [no writ where regulations already submitted]) or “merely to enable a party to prove a point. . . .” (*Morris, supra*, 94 Cal.App.4th at pp. 66 and 67 [citing cases].) Similarly, in addition to section 21168.9, the trial court should apply traditional equitable principles that account for current and anticipated circumstances. (See *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 432-25 [declining to enjoin project in part because it would waste taxpayer money and disrupt important research projects].)

The Superior Court will be called upon to apply these principles in light of five years of the evolution of the CALFED plan and its implementation since it was adopted in 2000, issues that this Court determined were not relevant to the present Opinion and did not consider. (Slip Op., p. 198.) For example, the trial court should be permitted, if relevant, to consider the utility of providing specified information on the Environmental Water Account in another environmental impact report. Both Appellants and State Respondents have noted that state agencies

issued an EIR for that program in 2004. (*Ibid.*)

Additionally, in the five years since these actions were filed, major legislation affecting the CALFED plan and addressing the Record of Decision and PEIS/R was passed by the Legislature, (Wat. Code, § 79400 *et seq.* [the California Bay Delta Authority Act]), the citizens of California, (Wat. Code § 79500 [Proposition 50]), and the Congress (118 Stat. 1681, 1682 [CALFED Bay-Delta Authorization Act]). Though the California Bay Delta Act expressly preserved the ability of Appellants to obtain some relief under CEQA regarding the PEIS/R and ROD (Wat. Code, §§ 79407, 79432), both that law and Proposition 50 also provide statutory direction to state agencies regarding implementation of the CALFED plan, often with reference to the ROD and PEIS/R and the objectives stated in those documents. (See Wat. Code, §§ 79402, 79403.5, subd.. (a), (b) [Bay-Delta Act]; *Id.* §§ 79501, 79504, 79550-555 [Proposition 50].) CEQA compliance is not required for legislative acts (CEQA Guidelines, § 15378, subdiv. (b)(1)) or for agency decisions that determine compliance with applicable statutes (*id.*, § 15357). Complicating matters further, significant refocusing and revision of the CALFED plan has been a recent and major consideration of state agencies in the past year.

At this time, no party nor the Court can determine how these factors

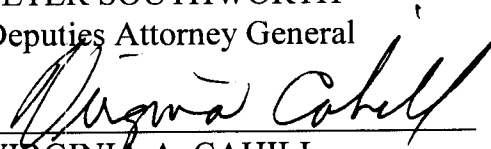
may affect the remedy, if at all, or what the remedy should be. Rather, that will depend on the relief requested by Appellants and the Superior Court's consideration of their application under Public Resources Code section 21168.9. State Respondents respectfully request this Court to clarify that it is not prescribing a specific remedy, such as a "new PEIS/R" and instead instruct the trial court to tailor a remedy in compliance with that statute.

CONCLUSION

The petition for rehearing should be granted.

Dated: October 24, 2005

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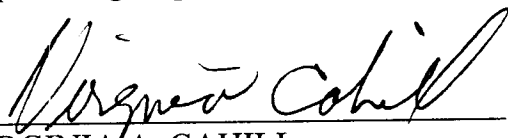
**CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULES 25(b)(3), 14(c))**

I hereby certify that:

Pursuant to California Rules of Court, Rules 25(b)(3) and 14(c), in reliance upon the word count feature of the software used, I certify that the attached STATE RESPONDENTS' PETITION FOR REHEARING contains 8,574 words.

Dated: October 24, 2005

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: IN RE: BAY-DELTA PRGRAMMATIC ENVIRONMENTAL IMPACT
REPORT COORDINATED PROCEEDINGS

No.: CONSOLIDATED CASE NOS. C044267, C044577

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On October 24, 2005, I served the attached **STATE RESPONDENTS' PETITION FOR REHEARING** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

PLEASE SEE SERVICE LIST
ATTACHED

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 24, 2005, at Sacramento, California.

Julie Gomez

Declarant

Signature

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